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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

MARY DOMANY and ANDREW DOMANY,
Petitioners,

v.

OTIS ELEVATOR COMPANY, and
SEARS, ROEBUCK & COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The Petitioners, Mary and Andrew Domany, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the case on December 9, 1966.

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Northern District of Ohio, Eastern Division, on defendant's motions to set aside verdict is unreported. (Appendix, p. 24, *infra.*) The opinion of the Circuit Court of Appeals for the Sixth Circuit (Appendix, p. 33, *infra*) is reported at 369 F. 2d 604 (1966).

JURISDICTION.

The judgments of the Court of Appeals were entered on December 9, 1966 (Appendix, pp. 50-53, *infra.*) Mr. Justice Stewart by order dated March 6, 1957 extended the time for filing the within petition to March 23, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. In a case where the trial court properly refused to instruct the jury on the issue of contributory negligence where there was *absolutely no evidence* of same in the record; and where the Circuit Court of Appeals reversed petitioners' jury verdicts on the ground that the trial court should have so instructed the jury; should not the United States Supreme Court in the exercise of its supervisory powers over the lower federal courts grant the petitioners certiorari?

2. Does not the reversal of a jury verdict by the Circuit Court of Appeals, in the absence of plain legal error prejudicial to respondents, constitute an invasion of petitioners' constitutional right to trial by jury under the Seventh Amendment?

3. In a case where an Ohio Federal Court properly applied Federal law under Article IV, Section 1 of the United States Constitution in according a valid Indiana marriage "full faith and credit," and where the reviewing Circuit Court of Appeals refused to so honor that marriage, have not the petitioners, husband and wife, suffered a grievous violation of their constitutional rights under said Article IV?

CONSTITUTIONAL PROVISIONS AND SUPREME COURT RULES INVOLVED.

Supreme Court of the United States, Rule 19, 1.(b), U. S. C. A., United States Constitution, Article IV, Section 1, and Amendment VII are set forth in the Appendix at pages 55-56, *infra*.

STATEMENT.

These actions were instituted in the District Court based upon diversity of citizenship pursuant to 28 U. S. C. A. 1332(a) and judgments thereon were entered November 10, 1964 (Appendix, pp. 54, 55, *infra*.)

The judgments rendered in the District Court were awarded in actions filed by the Petitioners arising from personal injuries received by petitioner Mary Domany in 1960 upon an escalator located in the department store operated by Respondent Sears, Roebuck & Co. (hereinafter called Sears) and maintained by respondent Otis Elevator Company (hereinafter called Otis). Summarizing the facts briefly, Mary Domany while Christmas shopping at the Sears store, was descending on a moving escalator to meet her husband and children on the main floor. The escalator stopped abruptly throwing Mrs. Domany down, despite the fact that she was holding the handrail. The overwhelming evidence was that the escalator's short stopping distance caused it to be dangerous for its passengers.

The consequences suffered by Mrs. Domany and her family were disastrous. The accident caused a painful leg injury requiring corrective surgery and left Mary Domany a mental and emotional cripple—an affliction she will bear the rest of her life. Petitioner Andrew Domany's

action arose from loss of his wife's services as a wife and mother and for the considerable medical, hospital and other attendant expenses.

These actions were consolidated for trial. The jury found that the respondents were negligent and that the petitioners were damaged in the amount of $240,000. District Court Judge Kalbfleisch overruled the motions for new trial and for judgment notwithstanding verdict, concluding that the evidence supported the jury verdict. Upon appeal the Circuit Court of Appeals for the Sixth Circuit found no error relative to respondents' negligence or damage. Nevertheless, the jury's verdict was reversed by the Appellate Court on grounds that have no legal foundation whatsoever. The Court remanded the cases for new trial, stating that the District Judge should have submitted the issue of contributory negligence to the jury. It can be clearly demonstrated to this Court that the jury's verdict was upset by the simple expediency of saying that prejudicial error was committed upon a jury instruction, when in fact, the District Court was quite correct in refusing the requested instructions.

Also, in remanding Mr. Domany's case for new trial the Court of Appeals states that the petitioners did not sufficiently prove they were married, despite the uncontradicted testimony that they were married ceremonially in Indiana more than 3 years before the accident. It can be likewise shown that the review court's conclusions regarding marital status are patently erroneous.

That the trial judge ruled correctly upon these issues will be treated in detail in Sections 3 and 4 hereafter.

REASONS FOR GRANTING THE WRIT.

1. Supervisory Powers. It would hardly be possible to present a more convincing precedent for granting a certiorari than *Gibson v. Lockheed Aircraft Service, Inc.*, 350 U. S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (1956).

In the per curiam opinion this court states at p. 357 the reason certiorari was granted:

> "We consider this to be a case where, in the exercise of our supervisory powers over the lower federal courts, the judgment of the Court of Appeals should be reversed in the interest of justice and that of the District Court reinstated."

In the concurring opinion Mr. Justice Frankfurter elaborates as follows:

> "But my brethren find that certain rulings of the Court of Appeals involving ordinary questions in the law of negligence, which by themselves never would have warranted the granting of a writ, are so obviously and injuriously erroneous, 'as to call for an exercise of this court's power of supervision.' This is of course one of the considerations within our Rule governing review on certiorari. Rule 19(1)(b) 28 U. S. C. A."

The pertinent portion of the foregoing rule reads:

> "(b) Where a court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of the court's power of supervision."

The similarity of what occurred in courts of appeal in *Gibson, supra,* and in the case at bar is remarkable—the only real difference being that in the instant cases the erroneous ruling is exceedingly more obvious and injurious.

The Court of Appeals in the *Gibson* case, 217 F. 2d 730, reversed the jury's verdict, holding that the trial

judge committed prejudicial error in refusing certain requested jury instructions relating to contributory negligence. In reinstating the judgment of the District Court, this Court concluded:

> "A thorough consideration of the record convinces us that the charge as given by the trial court was both complete and correct. Cf. District of Columbia v. Woodbury, 136 U. S. 450, 466, 10 S. Ct. 990, 996, 34 L. Ed. 472. There was no error in refusing the requested instructions."

Petitioners earnestly submit that even a cursory review of the record and the opinion of the Court of Appeals in the within cases, discloses compelling reason why this Court should grant this writ in the exercise of supervisory powers. As demonstrated hereafter, the complete absence of substantial competent evidence of contributory negligence certainly justified the trial court's charge to the jury.

2. Constitutional Right to Jury Trial. An equally important reason for granting this writ exists because the Court of Appeals' reversal of the jury verdict constitutes a violation of the following provisions of the Seventh Amendment of the United States Constitution:

> "* * * no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law."

Many decisions of this Court interpreting this amendment uniformly hold that federal appellate courts can grant a new trial *only* for some error of law in the trial court. 5 *Moore's Federal Practice* (2 ed.), 88, Sec. 38.08 (5). The leading Supreme Court cases in point are *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798, *Galloway v. United*

States, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439, all of which upheld judgment of the district court based on the Seventh Amendment.

The necessary corollary of the above rule is that a federal appellate court violates the Seventh Amendment when it reverses a jury verdict where no error of law appears in the record.

In *Atlantic & Gulf, supra,* this Court concluded that the trial court had charged the jury correctly and that the subsequent reversal of the jury's findings were in contravention of the Seventh Amendment. This is precisely what occurred upon appeal in the instant cases which calls for corrective action by the court.

The holding in *Galloway, supra,* at p. 395 is that an appellate court may review a District Court's abuse of discretion in ruling on the question whether evidence is sufficient for submission to jury. There was no finding of abuse of discretion in the within cases, nor could there be.

Fairmount, supra, reiterated the long standing rule under this amendment that a Circuit Court of Appeals cannot review a trial court's action in denying a new trial for error of fact where such motion is based on excessive verdict. In view of the groundless reason for reversal advanced in the opinion of the Court of Appeals, the petitioners are sincerely convinced that the amount of the verdicts silently entered into the decision to reverse the jury's verdict. Of the six questions on appeal, the one claiming excessive damages was the only issue not even discussed in the opinion. Expansion of the Seventh Amendment's re-examination provision has developed on the appellate level respecting damages. 6 *Moore, Federal Practice* (2d Ed.), p. 3836, Sec. 5908 (6). However, this

Court has yet to rule in this interpretation. *Neese v. Southern Ry.*, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60. Even under existing appellate decisions, the Seventh Amendment obviously prevented the Court of Appeals from granting new trial to respondents by re-examining damages. The point being made here is that the appellate court cannot do indirectly (i.e., reversing a jury verdict on insupportable legal grounds) that which is forbidden directly (re-examination of damages). Petitioners are confident that this Court would not hesitate to exercise its jurisdiction where the jury verdict is reversed on superficial reasoning which proves invalid under legal analysis.

3. Argument that there is no evidence of contributory negligence. The Appellate Court refused to apply basic rule of law applicable upon this question which is found in the fifth syllabus of *Bush Adm'r vs. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N. E. 2d 851.

> "Neither negligence nor contributory negligence is presumed. On the contrary, there is a presumption that * * * (plaintiff) was acting as a person of ordinary care and prudence who would have acted under the same or similar circumstances. To warrant a submission of the issue of contributory negligence to a jury it is essential that some evidence be adduced tending to show that the plaintiff failed in some respect to exercise the care of an ordinarily prudent person under the same or similar circumstances and that such failure was a proximate cause for his injury * * *."

Further, the Court of Appeals failed to apply the rule it cites in *Durham v. Elevator Co.*, 166 Ohio St. 31, 139 N. E. 2d 10, that to submit an issue to a jury, *substantial competent* evidence of relevant facts must be presented by the

party having the burden of proof. This criterion is applicable under both Federal and Ohio law. (5 *Moore's Federal Practice* (2d Ed.) 102-4, Sec. 38.10.) That contributory negligence is an affirmative defense which must be proved by the defendant under state and federal law is also beyond question. Rule 8(c) of Federal Rules of Civil Procedure, 28 U. S. C. A.; 39 *Ohio Jurisprudence* 2d 714.

A brief portion of the record in the case at bar must be examined to determine whether respondents present *substantial competent* evidence that Mary Domany failed to exercise ordinary care which proximately caused her injury. If they did *not*, they are not entitled to the instruction and were the District Judge in that instance, to submit that issue to the jury, he would be permitting the jury to guess and speculate and *that* would be prejudicial error. *Worden v. Tri-State Insurance Company,* 10 Cir., 347 F. 2d 336; *W. Moore v. Smith,* 3 Cir., 343 F. 2d 206; *Mason v. Mathiasen Tanker Industries, Incorporated,* 4 Cir., 298 F. 2d 28. Further, under Rule 61, Federal Rules of Civil Procedure, 28 U. S. C. A., a verdict should not be set aside unless the failure to instruct is shown to affect the substantial rights of the parties and substantial justice. *Franklin v. Delgado,* 5 Cir., 262 F. 2d 439.

The only competent evidence that was adduced that has any degree of relevancy to the issue of contributory negligence is the positive testimony of Mary Domany that she was holding the handrail while she rode the escalator (pp. 57, 58, *infra*). There is not a shred of evidence to contradict this testimony, or tending to prove that she failed to exercise care for her own safety.

What then prompted the Circuit Court of Appeals to cloak the trial judge in the stained robes of prejudicial error? Is there *substantial competent* evidence in the record to justify the reviewing court's reversal of the jury

verdict? The court's opinion must be examined in search for answers.

In the vital paragraph of the Appellate Court's opinion (pp. 35-37, *infra*) the court attempts to explain the basis for its reversal. The following analysis of the court's findings will most vividly demonstrate that the reversal was not well founded.

a) "There were evidence that there were signs clearly visible at the approach to, and on, the escalator in question, cautioning passengers to hold the handrail."

This is undisputed evidence that obviously has no relevancy to contributory negligence, at least in absence of evidence that Mary Domany failed to heed the signs.

b) "An elderly man who was below Mrs. Domany on the escalator walked off the escalator after it had stopped short and was not injured."

The record shows that the man referred to was estimated to be age 65 (pp. 57, 58, 59, 65, *infra*). The mere fact that a man did not fall when the escalator stopped is clearly irrelevant and incompetent to prove contributory negligence.

It is an elementary rule of evidence that similar acts (or non-occurrence thereof) are incompetent evidence unless *similarity in circumstances* is first established. Expression of this rule appears in 31 A. L. R. 2d 190 at page 220.

"As indicated in the foregoing discussion, dealing with the relevancy, as to particular issues, of evidence of the absence of other accidents at the place where the plaintiff or his property suffered the courts have universally recognized or assumed that in order for such evidence to be relevant for any purpose it must be

shown that during the period involved the conditions at the place in question were substantially similar to those prevailing at the time of the accident in suit."

The divergent circumstances as between the unidentified man and Mrs. Domany are apparent. Without some evidence, should a jury be permitted to speculate: that the man had only feminine strength; that he was wearing the same type of shoes and assumed the same stance; that being at the bottom was no different than being in the middle of the escalator; that he was holding a purse in the right hand—the obvious variations become ludicrous. Also, it might well have been that the man was exercising more than ordinary care (e.g., that he was holding on with both hands).

That such evidence is also irrelevant to the issue of contributory negligence is set forth in 21 *Ohio Jur.* 2d 225-6, Evidence Sec. 211.

"* * * In all cases in which evidence of other accidents occurring at the same place, in the operation of the same or a similar machine, or by the use of the same or similar appliances, is admitted, it is (1) for the purpose of showing the dangerous character or condition thereof—whether or not a dangerous condition existed, and (2) to show notice to the defendant of such character or condition—to bring home to him notice of the danger or defect which is claimed to have caused the accident. But such evidence is distinctly not admissible for the purpose of showing negligence on the part of the defendant. * * * *Nor is such evidence admissible to show either care or negligence on the part of the plaintiff.* * * *" Ashtabula v. Bartram,* 3 O. C. C. 640, 2 O. C. D. 372; *Brooklyn Street R. Co. v. Kelley,* 6 O. C. C. 155, 3 O. C. D. 393, affd 53 O. S. 646, 44 N. E. 1148 (emphasis added).

c) "There was testimony by those who performed tests on the escalator to the effect that by holding

onto the handrails they were able to maintain their balance."

No tests were conducted to determine if a person would fall on the escalator. The appellate court in reversing the jury verdict relies on evidence that was incompetent for the purpose of offering proof of contributory negligence. The tests referred to were instituted by Petitioners more than 3 years after the accident for the purpose of measuring stopping distance, which indeed, proved to be dangerously short as concurred in by Otis' own witness and employee.

These tests were conducted by two engineers, who testified as qualified experts on behalf of Petitioners. (pp. 60-62, 64, 65, *infra.*) Various men (the engineers as well as all counsel for parties) had occasion to be riding the escalator when it was stopped to measure the stopping distance. All of the men knew, of course, that the escalator was going to be stopped. The appellate court relies on the fact that none of these men happened to fall down during the tests (pp. 63-65, *infra*), despite obvious dissimilarities which would render such evidence incompetent to prove contributory negligence.

The applicable rule of evidence is that results of experiments are incompetent, unless it is established by evidence that the *same or substantially similar conditions* existed during the tests. *St. Paul & Marine Ins. Co. v. Baltimore & Ohio R. Co.*, 129 Ohio State 401, 195 N. E. 861.

The observations of the court in *Bickley v. Sears*, 62 Ohio App. 180, 23 N. E. 2d 505, are equally applicable to the case at bar (p. 186):

"Another claimed error in evidence was that the court refused to permit the store manager to testify concerning an experiment he performed the next day by putting some of the sweeping compound on the store

floor and trying to slip on it himself. From the few facts surrounding the experiment as offered by the defendant and shown in the record and their dissimilarity to the situation shown by plaintiff's evidence, the court did not abuse its discretion in ruling out this evidence. Many dissimilarities no doubt occurred to the court, among them: The witness knew what he was doing or trying to do—the plaintiff was not aware of her peril; his weight may have been much different than hers; his shoe, especially the heel, was quite different from that of a woman's shoe and it does not appear whether the heel of his shoe was of the same material as that of the plaintiff, or whether new or worn."

In the instant case, testimony regarding the tests was qualified and received into evidence as bearing on the issue of respondent's negligence, i.e., the short stopping distance of the escalator. Respondent did not even attempt to qualify (by showing similar conditions) the incidental testimony that no one fell while testing stopping distance. Connecting this testimony with issue of contributory negligence was impossible due to the vastly different circumstances. It is incomprehensible how the review court could, nevertheless, treat this testimony as substantial competent evidence of contributory negligence in reversing the jury verdict.

d) "While the plaintiff, Mary Domany, testified that she was holding onto the handrail at the time of the accident, the jury might well infer that she was not. As the trial judge said in his charge, 'You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve any witness wholly, or in part.' Such an inference would be an immediate inference from the facts proven and would not be predicating one inference on another inference."

Petitioner must candidly say that such reasoning is absurd. The charge to the jury as to witnesses' credibility has no relationship at all when determining whether a jury issue is presented. First, the trial judge determines whether there is evidence of facts sufficient to submit a given issue to the jury. The jury's role in weighing credibility of witnesses, then applies in determining issues *properly* submitted to it.

If the above quoted reasoning is valid, then the presumption of ordinary care would be non-existent. A jury could even find a defendant negligent based *solely* on his own testimony denying alleged negligent acts.

This Court had occasion to thoroughly review this question in *Chesapeake & Ohio Ry. v. Martin,* 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983, wherein it was declared:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of the opinion that this was not enough to take the question to the jury, and that the court should have so held."

Many cases are cited in support of this rule, including *Hauss v. Lake Erie & W. R. Co.*, 105 F. 733, a Sixth Circuit case, in which the following pertinent observations are made:

> "The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony."
>
> "* * * Nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth."

In *Martin, supra*, this Court also adopts the expression of this rule in *M. H. Thomas & Co. v. Hawthorne*, 245 S. W. 966:

> "A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious; before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncon-

> tradicted testimony of interested parties, when it is positive and unequivocal and there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas."

In view of the presumption that Mary Domany exercised ordinary care, the positive testimony that she was holding the handrail and the lack of any evidence tending to show careless conduct on her part, the trial court correctly withdrew the issue of contributory negligence from the jury.

The appellate court in its opinion states that there are facts in the record from which a jury might infer that Mary Domany was not holding the handrail. From the preceding analysis of the opinion it can be readily seen that there are no such facts in the record. However, there is a distinct reason that the trial judge was correct in his charge on contributory negligence. To illustrate, let us assume that there was some substantial competent evidence from which the jury might reasonably infer that Mary Domany was not holding the handrail. Still, a jury issue would not thereby be presented. To find contributory negligence it would be necessary to draw a second inference from the first one: that the inferred failure to hold the handrail caused her to fall. Although the appellate court claims that separate immediate inferences are involved, it is apparent that one inference would necessarily be based on another. In *McDougall v. Glenn Cartage Co.*, 169 Ohio St. 522, 160 N. E. 2d 226, the court on page 525 states:

> "It is of course basic that an inference can not be predicated upon a fact the existence of which rests on another inference."

4. Argument on Marriage Status. Respondents in their answers "denied for want of knowledge" that Petitioners were man and wife. Then, similarly to their procedure on the issue of contributory negligence, they offered no evidence on the subject. Judge Kalbfleisch once again decided that in the absence of any probative evidence attacking the status of marriage, that status was not in issue.

On appeal, Respondents repeated their charges that the Domanys were not married and were "living in sin." The Court of Appeals borrowed a page from a book as yet unwritten and held in effect that the 1957 ceremonial marriage of the Domanys in Angola, Indiana was not entitled to the full faith and credit in the Ohio courts that the Constitution commands. If the Court of Appeals were correct, Andrew Domany the individual, a man alone save for the Constitution, not only lost a $65,000 judgment for loss of his wife's consortium services, companionship, and his out-of-pocket expenses, but was exposed to prosecution for bigamy and the children that Mary Domany bore him have been bastardized. If these are the concerns of one man as opposed to those of society, we fail in our efforts to distinguish them. The Court of Appeals unwittingly imperilled the status of all second marriages.

The appellate court saw fit to devote half its opinion to questioning whether the Petitioners are husband and wife. Upon release of the appellate decision, the newspaper services announced to the world—

> "The appeal also stated that Domany had a wife somewhere in Europe and thus, not legally married to Mrs. Domany, was not entitled to any damages."

Understanding the resulting humiliation and disgrace suffered by Mr. and Mrs. Domany and their two school age children requires little imagination. Sears in its brief on appeal admits that during the trial it characterized the

Domanys as "living in sin." Indeed, there was a deliberate effort to impugn their moral character before the jury under the guise of relating it to damages. This suggestion has now snowballed to the point where friends, neighbors and fellow citizens of the Petitioners have been led to believe that the Domanys are committing adultery and their children are being taunted as "bastards."

How does this sorry state of affairs arise from a negligence action in our Federal Court System? Sears, in seeking reversal of the jury verdict awarded to Andrew Domany for medical expenses and loss of services consortium, claimed that as a matter of law the Domanys were not married at the time of the accident.

The Petitioners are in fact married and were husband and wife when the accident occurred. The only relevant evidence regarding marital status is the testimony of the Petitioners that in 1957 they were married ceremonially in Angola, Indiana (pp. 59-60, *infra*). Sears produced no evidence to contradict this fact, but attempted to prejudice the jury by showing that Mr. Domany was previously married in Czechoslovakia (p. 60, *infra*) and that Petitioners entered into a common-law marriage in 1952 (p. 59, *infra*).

It is axiomatic that husband and wife are no less married because they formalize a common-law marriage. Regarding the previous marriage behind the iron curtain, Mr. Domany testified that he was divorced (p. 60, *infra*):

> "*Question*: At the time you began to live with Mrs. Domany in February, 1952 were you then divorced from your wife in Europe?
>
> *Answer*: I was divorced because my wife—my ex-wife, she in Czechoslovakia—give to the court."

The only other evidence was that Mr. Domany filed a divorce action in Cleveland in 1953 (p. 60, *infra*) and that 1953 was not the year he got his divorce (p. 60, *infra*).

Contrary to assertions of Sears, no other fact regarding Andrew Domany's divorce was adduced in evidence. What is most disturbing is that the appellate opinion contains some startling statements of fact which find no support in the record but are strictly a product of Sears' innuendoes. In fairness, it should be noted that Sears has now changed legal counsel.

To demonstrate that the reviewing court's finding of marital facts is completely unsupported by the record, reference is made to the last paragraph on page 608, 369 F. 2d 604 (pp. 36-37, *infra*) of the opinion.

a) "The Plaintiffs entered into an alleged common-law marriage in 1952. At this time, Plaintiff, Andrew Domany, had a wife and three children living in Europe."

Comment: The only evidence is Mr. Domany's testimony quoted above which is the direct opposite of this statement (p. 60, *infra*).

b) "However, in 1953 he filed a suit for divorce in Cleveland, in which he alleged that he had a wife living in Europe."

Comment: As seen above, Mr. Domany testified the action was filed, but there was absolutely no evidence as to what was alleged in the action; none of the pleadings or other papers therein were offered in evidence; nor was it determined whether the action was filed in this country merely to settle property rights.

c) "The wife in Europe filed an answer and contested the action."

Comment: Again, there is no evidence to this effect.

d) "No divorce was granted."

Comment: As seen above, the testimony was that no divorce was obtained in 1953 (p. 60, *infra*).

e) "There was no further evidence that the European marriage was ever dissolved."

Comment: This ignores Mr. Domany's testimony that he was divorced (p. 60, *infra*).

There is no evidence to contradict Mr. Domany's testimony that he was divorced when he entered into the common-law marriage. The opinion's misstatement of facts contained in the record is particularly disturbing because of the obvious implication of disreputable conduct.

From this distorted statement of fact, the appellate opinion applies principles of law which are no less questionable. The reviewing court, commencing with the false premise that there was no evidence of Mr. Domany's divorce, then holds, in effect, that the Indiana ceremonial marriage must be *presumed to be invalid* if dissolution of the prior marriage is not shown.

It appears that the appellate court held that the Domanys were not married as a matter of law and that judgment notwithstanding verdict should have been granted as to Andrew Domany. However, it is evident that this was not the holding of the Court of Appeals, because, necessarily, the case would not have been remanded for new trial. To further add to the confusion, the opinion states that Judge Kalbfleisch correctly refused to submit the marital issue to the jury, but that he erred in not advising counsel as to the reasons (p. 38, *infra*). In any event, the marital law set forth in the opinion constitutes the "law of the case" and thus its validity is raised here.

The law applied regarding marital status should be of particular interest to this Court. Probably no area of the law is more steeped with public interest than the basic unit of our society—the status of marriage. Courts throughout the land, of necessity, have adopted a very protective attitude toward this status. Any law or decision

to the contrary must be scrutinized in the fine light of constitutional protection and public policy. Thus it is manifest than an important question of state law is presented.

In the instant case, the Court of Appeals proclaims that, in the eyes of the law, the Indiana marriage is invalid unless proof is further adduced of the dissolution of a prior marriage. As pointed out, such proof is in the record. But aside from Mr. Domany's testimony, this ruling is patently suspect.

The reviewing court relies on a few Ohio cases cited in the opinion (p. 41, *infra*) that would place on the spouse the burden of proving dissolution of a prior marriage. These decisions find little or no support in other jurisdictions in the United States. 14 *ALR* 2d 9. As observed in 35 *Ohio Juris.* 2d 564, such decision has limited application:

> "* * * Although the rule is thus definitely settled in Ohio, the cases in which it is settled are cases between the spouses of the different marriages, or between the party contracting the two marriages and one of the spouses. It seems, therefore, that some weight may be given in favor of the majority rule mentioned above where the question arises as against third parties, such as children or grantees."

That Ohio would ordinarily follow the majority rule appears in *Machransky v. Machransky*, 31 Ohio App. 482, 166 N. E. 423, at page 485 as follows:

> "* * * Furthermore, the record unequivocally shows the second marriage of the husband in Russia, and it must be assumed that such marriage was not unlawful.
>
> When a marriage has been consummated in accordance with the forms of law, it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and

that such wife or husband of the first marriage is still living, does not destroy the *prima facie* of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage. 18 *Ruling Case Law*, 417."

This same view was taken in *Olijan v. Lubin*, 38 O. L. A. 393, 50 N. E. 264, which was affirmed by the Ohio Supreme Court in 143 O. S. 417, 55 N. E. 2d 658, without discussion on this point.

Without attempting to consider its validity in actions between spouses, widow's benefit cases and the like, the rule announced by the appellate court is unconstitutional as applied to Petitioner Andrew Domany because it is violative of the United States Constitution, Article IV. Full faith and credit must be extended to the Indiana marriage of 1954. Ohio has no choice in this matter, and neither by case decision nor judicial fiat should this Indiana marriage be ignored.

It is not within the scope of this petition to present a full legal analysis of this constitutional question. Suffice it to say, it is universally recognized that the validity of a marriage must be determined from the *lex loci contractus*. *Mazzolini v. Mazzolini*, 168 O. S. 357, 155 N. E. 2d 206. Early decisions of this Court hold that a marriage must be proved according to what would be proof of it where it took place. *Lieng v. Quia*, 228 U. S. 335, 33 S. Ct. 514, 57 L. Ed. 862; *Patterson v. Gaines*, 47 U. S. 550, 12 L. Ed. 553. Under Indiana law, the party who attacks a second marriage must prove its invalidity, *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600. It, therefore, is imperative this Indiana marital law be given full faith and credit under Article IV, Section 1 of the United States Constitution.

In summary, the treatment of the marital issue by the Circuit Court of Appeals should be reviewed by this Court because:

a) The facts found by the court are wholly unsupported by the evidence so as to call for an exercise of the court's power of supervision pursuant to Rule 19, 1.(b) of this Court, 28 U. S. C. A. (Appendix, p. 55, *infra*).

b) The reviewing Court misapplied an "important state question" contrary to state law and should likewise be reviewed under the provision of the same rule.

c) The marital law as applied in Petitioner Andrew Domany's case is unconstitutional under Article IV, Section 1 of the United States Constitution.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

EDWARD I. STILLMAN,
Attorney for Petitioners.

SHEEHAN, COOK, MILLER & STILLMAN,
Of Counsel.

APPENDIX.

MEMORANDUM OF DISTRICT COURT RE: MOTION FOR JUDGMENT N. O. V. AND/OR NEW TRIAL.

KALBFLEISCH, *J.*

Defendant Sears, Roebuck & Co. and defendant Otis Elevator Company have filed motions for judgment notwithstanding the verdicts or for a new trial. Since both defendants present basically the same arguments in support of their motions, the Court's ruling on these motions will be discussed in this memorandum.

(2) The primary issue argued by the defendants is whether the Court erred in charging the jury on the doctrine of res ipsa loquitur as to Sears, Roebuck & Co. and Otis Elevator Company. Before that issue is discussed, there is a second issue which will be considered.

Defendant Sears maintains that the testimony of Pat Christmas relating to a statement made to him by a customer that "A kid pushed the button" (referring to the emergency Stop-button) should not have been excluded. Sears maintains that the statement should have been admitted as a spontaneous exclamation tending to prove that a child had pushed the emergency Stop-button. This statement was made to Mr. Christmas by an unidentified bystander when Mr. Christmas arrived at the top of the down escalator several minutes after it had been stopped.

This hearsay statement was highly prejudicial to the plaintiff and was properly excluded. A spontaneous exclamation offered to prove the truth of the matters asserted may be admitted in evidence under proper circumstances as an exception to the hearsay rule. The fact that a statement is uttered by an unidentified bystander is not fatal. However, as stated in 6 *Wigmore on Evidence* (3rd Ed.) 155, Section 1751:

> "Upon the ordinary principle applicable to all testimonial evidence * * * and therefore to hearsay statements offered under these exceptions * * * the declarant must appear to have had *an opportunity to observe personally* the matter of which he speaks."

This element was the crucial point in two Ohio cases, as it is in this case. In *The New York, Chicago & St. Louis Ry. Co. v. Kovatch,* 120 O. S. 532 (1929), the statement of an unidentified girl that "The engine runned over David" was admissible. The Court found from the evidence that at the time of the accident the child was standing at a point where she could have observed the accident. However, in *Potter v. Baker,* 162 O. S. 488 (1955), the statement of an unidentified man, "God, he rushed the light," was held to be inadmissible since (3) there was no evidence to show that the declarant had an opportunity to observe personally the occurrence asserted in his statement.

Whether or not Mr. Christmas reported accurately and correctly the statement he heard is immaterial. As in the *Potter* case, *supra,* what is decisive is that there is no evidence to show that this bystander personally observed a boy pushing the emergency Stop-button. The unidentified bystander could have based his statement on what someone else had told him. Certainly Mr. Christmas does not know whether this bystander saw a boy push the Stop-button. Further, the surrounding circumstances do not demonstrate the spontaneity of this declaration. For these reasons, the statement was inadmissible.

The fundamental question presented by the defendants in their motions is whether the doctrine of res ipsa loquitur should have been applied to Sears, Roebuck & Co. and Otis Elevator Company. Res ipsa loquitur is a rule of evidence which permits a jury to infer from the evidence that defendant was negligent. The inference arises

upon proof that the instrumentality causing the injury was in defendant's exclusive control, and that the accident was one which ordinarily would not occur in the absence of negligence. Both defendants maintain that under Ohio law the inference does not arise in this case.

With reference to the question of control, the Ohio cases cited by the defendants do not preclude the application of the doctrine of res ipsa loquitur in this case. As to the defendant Sears, it owes to an invitee using its escalator the duty to exercise the highest degree of care to which the situation is reasonably susceptible. *May Department Stores Co. v. McBride & Sons Co.*, 124 O. S. 264 (1931); *Welch v. The Rollman & Sons Co.*, 70 O. App. 515 (1942). This duty cannot be delegated to an independent contractor. *Richman Bros. Co. v. Miller*, 131 O. S. 424 (1936); *The Cincinnati & Suburban Bell Tel. Co. v. Eadler*, 75 O. App. 258 (1944); *The Globe Indem. Co. v. Schmitt*, 142 O. S. 595 (1944).

(4) The cases of *Krupar v. Procter & Gamble Co.*, 160 O. S. 489 (1954), where a man's hip was scratched by a small piece of wire imbedded in a bar of soap, and *Huggins v. Morrell & Co.*, 176 O. S. 171 (1964), where a jar of pig's feet exploded, do not substantiate the position of the defendants.

In the recent *Huggins* decision, *supra*, an exploding bottle case, the Court quoted with approval *Atwell v. Pepsi Cola Bottling Co. of Washington, D. C.*, 152 A. 2d 196, and *Joffre v. Canada Dry Ginger Ale, Inc.*, 222 Md. 1, 158 A. 2d 631. In the *Atwell* case, the plaintiff joined both the bottler and the retailer of a carbonated beverage, and the Court said:

> "Appellant in effect contends that the doctrine is applicable against both appellees; that it was the duty of each appellee to come forward with proof that it was free from negligence; and that she should be re-

> lieved of her burden of showing that the accident was more probably the fault of one than the other. This might be true if appellee's possession of the bottles was joint, but it was not; it was *successive* * * *."

The Ohio Supreme Court then quoted this language from the *Joffre* case:

> "Generally it has been held that res ipsa is not applicable against multiple defendants where it is not shown that their liability was joint or that they were in joint or exclusive control of the injury producing factor, or where the wrongdoer, among several possible, was not identified."

Cases like the *Krupar* case and the *Huggins* case, where the plaintiff was injured and sued both the manufacturer and the retailer, are distinguishable from the instant case in that here Sears and Otis did not have *successive* control but both jointly had exclusive control over the escalator.

Neither *Feinberg v. Hotel Olmsted Co.*, 152 O. S. 417 (1949), nor *Parise v. Otis Elevator Co.*, 100 O. App. 200 (1954), suggests a different rule. In *Feinberg* the Court found from the evidence that the defendant did not have exclusive control over the elevator. It was the opinion of the Court that res ipsa loquitur was not applicable when the evidence disclosed that the plaintiff and his assistant used a freight (5) elevator for the purpose of removing the door of a refrigerator which was too large and heavy for the elevator, and that the defendant had not participated in the undertaking. In the *Parise* case the evidence disclosed no exclusive control over the elevator by Otis, and further disclosed that the employees of Isaly Dairy had tampered with the safety devices on many occasions.

The Ohio cases dealing with the question of exclusive control are not in conflict with *Enslein v. Hudson & Man-*

hattan R. R., 165 N. Y. S. 2d 630 (1957), aff'd. in part and rev'd. in part, 176 N. Y. S. 2d 70 (rev'd. as to damages), aff'd. 6 N. Y. 2d 723, 158 N. E. 2d 504 (1959). There the up escalator suddenly jerked and lurched, throwing and injuring the plaintiff. Res ipsa was applied against both the lessee Hudson, who managed and controlled the escalator, and Peelle Company, which likewise controlled and maintained it. The trial court found and the reviewing courts affirmed that Hudson owed a nondelegable duty of keeping its equipment reasonably safe, and therefore retained control along with the defendant Peelle. Such control of the escalator was either simultaneous or in necessary rotation with defendant Hudson. The trial court said:

> "It is not essential for the application of res ipsa doctrine that there be but a single person in control of that which caused the damage * * * where, as here, some or all of the interdependent defendants are in control of an instrumentality which is involved in an accident due to its improper operation, they are thereupon called upon to explain such operation."

In reaching a similar conclusion, the Court in *Vandagriff v. J. C. Penney Co.*, 39 Calif. Rep. 671 (1964), said in applying res ipsa to defendant Westinghouse:

> "Westinghouse had contracted, according to J. C. Penney Company's cross-complaint, to use all reasonable care to maintain the electric stairways in proper and safe operating condition. The amount of caution required increases or decreases as does the danger that reasonably should be apprehended. It cannot be said that a reasonable inference could not be drawn that Westinghouse had been negligent under the circumstances."

(6) The reason for the doctrine is to permit the jury to infer negligence under circumstances where the existence of defendant's negligence is more reasonably probable

even though the plaintiff cannot demonstrate specific acts of negligence. To place on the plaintiff the burden of showing which of two defendants caused the injury under circumstances where both defendants either owned, managed, maintained or controlled the dangerous machinery would be to preclude the application of the doctrine of res ipsa at a time when the plaintiff needs the doctrine the most. This would frustrate the very purpose and reason for using the doctrine. Such a result would be blind to modern day practices and to the high degree of care due to the plaintiff.

Here both defendants had joint and simultaneous control, and therefore the doctrine is applicable to both. There was no evidence to show that the escalator was stopped by pushing the Stop-button. Further, not only did the escalator stop, but the jury found that it stopped with such force that plaintiff Mary Domany was injured. According to her testimony, Mary Domany does not know why the escalator stopped; she only knows it stopped suddenly and with force sufficient to throw her down. It was for the jury to decide whether this was due to defendants' negligence.

In *Fink v. N. Y. C. R. R. Co.*, 144 O. S. 1 (1944), the plaintiff, a passenger on a train, was injured when the train was derailed. The plaintiff proved the train was going 80 MPH when it hit a car. The Court applied res ipsa, saying that it was for the jury to infer negligence and not the Court. Then the Court said:

> "It would be a strange doctrine to say that in a jury trial the court is not permitted to draw the inference of negligence in a case which calls for its application of the rules and then to say that the court could determine as a matter of law that the inference had been rebutted or destroyed by an explanation offered by the defendant of the circumstances of the occurrence."

(7) If the defendants could successfully maintain that they did not have exclusive control because the escalator was equipped with a Stop-button and that the escalator may have been stopped by anyone using the emergency Stop-button when there was no evidence whatsoever that anyone had pushed the Stop-button, then the doctrine of res ipsa loquitur again could rarely be applied successfully in an escalator case.

Finally, the accident here was one which ordinarily does not occur in the absence of negligence. For cases where the doctrine applied in situations where the plaintiff was injured as a result of an escalator's jerking or stopping see *Welch v. The Rollman & Sons Co.*, 70 O. App. 515 (1942); *Liebow v. Jones Store Co.*, 303 S. W. 2d 660 (1957); *Sibley v. Otis*, 114 N. Y. S. 2d 177 (1952); *Enslein v. Hudson & Manhattan R. R., supra.*

The jury here was at liberty to find the ultimate fact one way or the other as they were impressed by the evidence. The weight of the inference, as well as the weight of the explanation offered to meet the inference, was for the determination of the jury. *Glowacki v. The Northwestern Ohio Ry. & Power Co.*, 116 O. S. 451 (1927).

Here for an unexplained reason the escalator stopped. It stopped with such suddenness and with such force that plaintiff Mary Domany was injured. Sears' duty to the plaintiff was to exercise the highest degree of care, and this duty was nondelegable. As the precautions which the defendant must take to avoid injury increase, there is a proportionate increase in the number of available hypotheses involving negligence. While the duty owed to the plaintiff by the defendant Otis was one of ordinary care, nevertheless it was for the jury to decide whether the probable cause of the stopping was due to the mechanism of the escalator. The mechanical parts of the escalator were

either in the exclusive control of Otis or in the joint and exclusive control of both defendants. Normally, unless there is negligence, an escalator does not stop so suddenly and with such force as to cause a passenger to be thrown down and injured.

(8) The defendants also claim the Court erred in refusing to charge the jury on the issue of whether Andrew Domany was lawfully the husband of Mary Domany. The basis for the claim was the admission by Andrew Domany that he filed for a divorce in 1953 but withdrew his petition when his wife, then living in Europe, contested the divorce action. However, Andrew Domany testified that his European wife obtained a divorce and that, upon receiving a letter notifying him of the divorce, he married Mary Domany in a formal ceremony on August 17, 1957.

Concerning the validity as between prior and subsequent marriages, the majority view is to the effect that the presumption of validity of the subsequent marriage overcomes the presumption of continuance of the previous marriage.

While Ohio follows an opposite rule when the question arises between the spouses of the different marriages, it would seem that Ohio would follow the majority rule should the question arise as against third parties. See 35 *O. Jur.* 2d, Marriages, Section 71. In a case such as this one, wisdom and fairness demand that the second marriage be presumed valid. There was no evidence to show that Andrew Domany was not divorced from his European wife. Upon the evidence in this case, the Court did not err in refusing to charge the jury on the issue as to whether Andrew Domany was the husband of Mary Domany.

The plaintiff Andrew Domany in case No. C 62-881 alleged in his complaint that "The plaintiff, Andrew Domany, is now and was at all times hereinafter mentioned

the husband of Mary Domany." The defendants filed separate answers in which, for want of knowledge, they denied this allegation of the plaintiff. Upon this state of the pleadings the defendants offered no evidence except the cross-examination of the plaintiff Andrew Domany. The cross-examination affirmatively (9) established his marriage to Mary Domany, and without any other evidence to the contrary, there was no issue to be submitted to the jury.

The defendants finally contend that the Court erred in refusing to submit to the jury the issue as to whether Mary Domany was contributorily negligent. There was absolutely no evidence offered by the defendants that Mary Domany, confronted with a sudden and unexpected emergency, did not exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. The evidence offered by the defendants as to the stopping distance of the escalator was not sufficient to raise the question of contributory negligence. The evidence disclosed that Mary Domany, through no fault of her own, was placed in a dangerous situation, and that she exercised the care required of her under the circumstances. Mary Domany testified in effect that she was holding the hand rail, and that she was exercising the degree of care required of her. The mere fact that she fell is not a sufficient basis for submitting the question of contributory negligence to the jury.

It was for the jury to decide whether, from all the facts, they would infer negligence on the part of either or both defendants. This the jury did in favor of the plaintiffs against both defendants. The jury's determination and verdict will not be disturbed.

The motions of the defendants for judgment notwithstanding the verdicts will be overruled.

The motions of the defendants for a new trial will be overruled.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 9, 1966.)

Before: O'SULLIVAN, Circuit Judge, CECIL, Senior Circuit Judge, and MATHES, Senior District Judge.*

CECIL, Senior Circuit Judge. Mary Domany and her alleged husband, Andrew Domany, plaintiffs-appellees herein, brought these actions against Sears, Roebuck & Company and Otis Elevator Company, defendants-appellants, hereinafter referred to as Sears and Otis, respectively, in the United States District Court for the Northern District of Ohio, Eastern Division. They recovered judgments in the amounts of $175,000 and $65,000, respectively. Sears and Otis each appealed.

Jurisdiction is invoked on the basis of diversity of citizenship. Section 1332, Title 28, U. S. C. Mary and Andrew Domany, hereinafter referred to as plaintiffs, are residents of Ohio. Sears is a corporation organized in New York with its principal place of business in Chicago, Illinois. Otis is a corporation organized in the state of New Jersey, with its principal place of business in New York City. The substantive law of Ohio is applicable. *Erie R. Co. v. Tompkins*, 304 U. S. 64.

The plaintiffs' claims arise out of an injury to Mary Domany resulting from the abrupt stopping of an escalator in a Sears store located in the Southgate Shopping Center in Maple Heights, Ohio. On November 18, 1960, Mrs. Domany was descending from the second to the first floor of the Sears store when the escalator upon which she was riding came to a sudden stop. She fell several steps to the floor below. Mrs. Domany sustained a ruptured fascia

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*William C. Mathes, Senior District Judge, Southern District of California, sitting by designation.

of one of the muscles of her right thigh and a contusion in the same area. At the time of her fall, Mrs. Domany was assisted by a lady employee of the store. She was able to walk and on the advice of the store security officer, she was taken by her husband to Suburban Community Hospital. She was treated at the hospital and released the same day. The following day, she saw her own doctor. Her physical injury was healed in a month. Sometime after the accident Mrs. Domany went to a psychiatrist who testified that she suffered from traumatic neurosis as a result of her fall.

The escalator involved in the accident was purchased from, and installed by, Otis. The escalator was serviced and maintained by Otis under a contract with Sears which provided that its possession and management were exclusively in Sears. The pit or place where the escalator mechanism was housed, while not locked, was under the exclusive control of Otis. Pursuant to this contract, Otis inspected and serviced the escalator at the Sears' store every Monday morning. In addition, Otis would respond to calls from Sears for service. The last inspection prior to the accident was made by Otis on Monday, November 14th. The escalator was found to be functioning properly on this inspection. The only service that Sears, through its employees, performed in connection with the escalator was to start and stop it at the beginning and end of each day. In accordance with Ohio standards, there were emergency stop buttons at the top and bottom on the escalator. The apparent explanation for the stopping of the escalator is that some unauthorized person pressed the emergency stop button. Without calling Otis for service, an employee of Sears restarted the escalator after the accident. Otis found the escalator to be functioning properly, on the next scheduled inspection, the following Monday.

Plaintiff, Mary Domany, sought to recover damages for the injuries she sustained as a result of the accident. Her alleged husband, Andrew Domany, sued to recover expenses paid by him as a result of his wife's injuries and for damages for loss of consortium. Otis and Sears were sued jointly. The first cause of action of each plaintiff was based on res ipsa loquitur and the second one on negligence. The trial judge submitted the case to the jury on both causes of action.

Both Sears and Otis claim that the trial judge erred in not submitting the issue of contributory negligence of the plaintiff, Mary Domany, to the jury. The trial judge instructed the jury, "There being no proof that Mary Domany did anything improper while on the escalator, she is not guilty herself of any negligence * * *."

It is a fundamental rule of our jury system that where there is a question as to the existence of certain alleged facts, the function of determining such facts rests with the jury and not the court.

> "(W)e note the established rule that in the face of a motion to direct the jury to return a verdict for one of the parties to an action, * * * the court must construe the evidence most strongly in favor of the party against whom the motion is made, and, where there is substantial competent evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in disposing of such a motion." *Durham v. Elevator Co.*, 166 Ohio St. 31, 36. See also *Hilleary v. Bromley*, 146 Ohio St. 212; *Botto v. Fischesser*, 174 Ohio St. 322.

In considering the case most favorably to the party against whom the motion is made, the court is required to take

into account any reasonable inferences that may be drawn from the facts in evidence. *Purdy v. Kerentoff*, 152 Ohio St. 391, *Wilkeson v. Erskine & Son*, 145 Ohio St. 218.

There was evidence that there were signs clearly visible at the approach to, and on, the escalator in question, cautioning passengers to hold the handrail. An elderly man who was below Mrs. Domany on the escalator walked off the escalator after it had stopped short and was not injured. There was testimony by those who performed tests on the escalator to the effect that by holding onto the handrails they were able to maintain their balance. While the plaintiff, Mary Domany, testified that she was holding onto the handrail at the time of the accident, the jury might well infer that she was not. As the trial judge said in his charge, "You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve any witness wholly, or in part." Such an inference would be an immediate inference from the facts proven and would not be predicating one inference on another inference. The rule in Ohio was announced in *McDougall v. Cartage Co.*, 169 Ohio St. 522, 2nd Syl., as follows:

> "The only inferences of fact which the law recognizes are immediate inferences from facts proved, but a given state of facts may give rise to two or more inferences, and in such case one inference is not built upon another but each is drawn separately from the same facts."

The district judge was in error in failing to submit the issue of contributory negligence of the plaintiff, Mary Domany, to the jury.

One of the claims made by Sears on this appeal is that Andrew Domany was not the husband of plaintiff, Mary Domany. Sears claims that the trial judge erred in not

directing a verdict in its favor on this issue or in the alternative in not submitting the question to the jury.

The plaintiffs entered into an alleged common law marriage in 1952. At this time, plaintiff, Andrew Domany, had a wife and three children living in Europe. He testified that he then believed that he was divorced from this wife. However, in 1953 he filed a suit for divorce in Cleveland, in which he alleged that he had a wife living in Europe. The wife in Europe filed an answer and contested the action. No divorce was granted. There was no further evidence that the European marriage was ever dissolved. On August 17, 1957, the plaintiffs had a ceremonial marriage in Angola, Indiana. The foundation of Mr. Domany's claims for expenses and damages for loss of consortium is that he was the lawful husband of plaintiff Mary Domany at the time of the accident. Without such a lawful relationship there can be no recovery by plaintiff Andrew Domany.

We cannot find from the record that counsel for Sears specifically raised the question of the validity of plaintiffs' marriage in the motion for a directed verdict at the close of plaintiffs' testimony or in the motion for a directed verdict at the close of all the testimony. Counsel did request before argument an instruction[1] in writing, to have the question submitted to the jury. The trial judge granted this request at the time it was presented and counsel claims to have argued the question to the jury. The only reference we find to the subject in the arguments is Mr

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[1] "You are instructed that before the plaintiff, Andrew Domany, may recover damages for the medical and hospital expenses in connection with the care of Mary Domany, or for the loss of her services, society and companionship or any expenses reasonably appurtenant to such loss, he must first establish by a preponderance of the evidence that Mary Domany was his lawful spouse at the time such expenses were incurred or such loss suffered." (Sears requested instruction No. 14.)

Gallagher's statement, "This was during a period when there was a mixed up marital status, and I don't care to get into that." The judge did not include the requested instruction in his general charge. He not only did not give the instruction but he assumed throughout the instruction that the plaintiffs were husband and wife. He said, "If you find the Defendants, either one or both of them, were negligent, and that such negligence was the proximate cause of Mary Domany's injuries, you will return a verdict in favor of Plaintiff Andrew Domany."

Counsel for Sears called the omission of the requested charge to the attention of the judge who said,

> "I spent all Friday night and part of Saturday morning, and we finally got the pleading out, and you admitted it. My conclusion is you not only did not affirmatively defend on it, but you admitted it. It may have been a mistake in the way you worded your answers. It looks like it, but the ultimate result is you don't deny it."

We think the trial Judge might very well have concluded that counsel had abandoned the issue when he did not argue it to the jury. Under these circumstances he was justified in not giving the charge. However, after granting the instruction the trial judge should have advised counsel of his reasons, when he decided not to give it.

Counsel for Sears did raise the question on motion for judgment notwithstanding the verdict or for a new trial. Error was claimed for failing to give request to charge No. 14, the instruction in question. In denying the motion, the trial judge said on this point,

> "The defendants also claim the Court erred in refusing to charge the jury on the issue of whether Andrew Domany was lawfully the husband of Mary Domany. The basis for the claim was the admission by Andrew Domany that he filed for a divorce in 1953

but withdrew his petition when his wife, then living in Europe, contested the divorce action. However, Andrew Domany testified that his European wife obtained a divorce and that, upon receiving a letter notifying him of the divorce, he married Mary Domany in a formal ceremony on August 17, 1957.

"Concerning the validity as between prior and subsequent marriages, the majority view is to the effect that the presumption of validity of the subsequent marriage overcomes the presumption of continuance of the previous marriage.

"While Ohio follows an opposite rule when the question arises between the spouses of the different marriages, it would seem that Ohio would follow the majority rule should the question arise as against third parties. See 35 *O. Jur.* 2d, Marriages, Section 71. In a case such as this one, wisdom and fairness demand that the second marriage be presumed valid. There was no evidence to show that Andrew Domany was not divorced from his European wife. Upon the evidence in this case, the Court did not err in refusing to charge the jury on the issue as to whether Andrew Domany was the husband of Mary Domany.

"The plaintiff Andrew Domany in case No. C 62-881 alleged in his complaint that 'The plaintiff, Andrew Domany, is now and was at all times hereinafter mentioned the husband of Mary Domany.' The defendants filed separate answers in which, for want of knowledge, they denied this allegation of the plaintiff. Upon this state of the pleadings the defendants offered no evidence except the cross-examination of the plaintiff Andrew Domany. The cross-examination affirmatively established his marriage to Mary Domany, and without any other evidence to the contrary there was no issue to be submitted to the jury."

While we do not find that the trial judge erred in refusing to give requested instruction No. 14, we cannot

agree with the statement of facts and law in his memorandum denying Sears' motion for judgment notwithstanding the verdict.

We have examined all the evidence[2] on the subject of the plaintiffs' marriage and we do not find that Andrew Domany testified that his European wife obtained a divorce and that he received a letter notifying him of the divorce. He did testify that he married Mary Domany in a formal ceremony on August 17, 1957. But this does not dispose of his first marriage. In his statement in the general charge, the judge said that the marriage was admitted and that Sears did not defend on it affirmatively. The pleadings as referred to by the judge in the portion of the opinion above quoted raise the issue. Andrew Domany in his amended complaint alleged that he was at all times the husband of Mary Domany, and Sears in its answer, for want of knowledge, denied it. We find nothing in the record admitting a valid marriage.

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[2] "Q. At the time you began to live with Mrs. Domany in February, 1952, were you then divorced from your wife in Europe?

"A. I was divorced because my wife—my ex-wife, she in Czechoslovakia—give to the court—

"Q. Did you believe you were then divorced?

"A. Yeah.

"Q. I see. Then is it the fact, Mr. Domany, that you filed for divorce here in Cleveland in 1953, a year after?

"A. Yes.

"Q. Yes, and is it the fact that your wife in Europe filed an answer and contested the divorce?

"A. (No response).

"Q. May I just have an answer to it? Did she file an answer to that petition for a divorce contesting it, sir?

"The Court: Do you understand what he means?

"The Witness: No, I don't understand.

"Q. I see. Did you get a divorce from her in 1953, at that time, from your wife in Europe?

"A. No.

"Q. You did not. All right. Now, did you have three children living in Europe from your first marriage?

"A. Yes."

We think, under Ohio law, the issue was further raised by the evidence. Andrew Domany testified that he had a wife in Europe. He brought an action for a divorce. No divorce was granted. There is no further evidence concerning a divorce from the European wife. Under Ohio law that marriage is presumed to continue until proof of its termination.

In the event this issue is raised in a retrial of the case, we discuss the Ohio law on the subject of subsequent marriages where there is a prior undissolved marriage.

There are two presumptions in law concerning the marital status of individuals. The rule followed in the majority of jurisdictions is that a marriage is presumed to be legal until proven otherwise. A corollary to this is the additional presumption that the first marriage has ended in a legal divorce. Under the minority rule which is followed in Ohio, it is presumed that once a marriage is entered into it continues until proof of dissolution. To complement this presumption, it is further presumed that there was no valid divorce in the first marriage in the absence of positive proof. *In re Clark's Estate,* 69 Ohio Law Abs. 435; *Industrial Comm. v. Dell,* 104 Ohio St. 389; *Evans v. Industrial Comm.,* 166 Ohio St. 413; *Dibble, v. Dibble, Admx.,* 88 Ohio App. 490; *Evans v. Reynolds,* 32 Ohio St. 163.

A conflict arises between these two presumptions when, as in this case, a spouse of a first marriage enters into a second marriage, while the first spouse is still living, and no evidence is presented as to the dissolution of the first marriage. Under the majority rule, the legality of the subsequent marriage would be presumed, in spite of the fact that a spouse of the former marriage was still living. In Ohio, under the minority rule, it would be presumed that the status of the parties to the first marriage continued

and the burden would be upon the parties claiming the validity of the second marriage to overcome the presumption. *Evans v. Reynolds, supra,* was an early Ohio case on the subject. There the defendant "married" the deceased at a time when she had a husband living in England. She claimed that this first marriage was void under the laws of Great Britain, but she offered no evidence to substantiate her claim. The court held, at p. 165,

> "But that marriage (the first one) must be presumed to be lawful till some enactment which annuls it is produced and proved by those who deny its lawfulness."

The district judge said, in his memorandum quoted above, "it would seem that Ohio would follow the majority rule should the question arise as to third parties. See 35 *O. Jur.* 2d, Marriages, Section 71. * * * There was no evidence to show that Andrew Domany was not divorced from his European wife. The cases cited by *Ohio Jurisprudence* do not support the statement of the text, nor have we found any in Ohio that do. In *Machransky v. Machransky,* 31 Ohio App. 482, the court recognized the validity of a Jewish divorce obtained in Russia, and therefore there was no legal impediment to the second marriage in *Olijan v. Lublin,* 38 Ohio Law Abs. 393, affirmed, 143 Ohio St. 417, the court merely commented that Ohio followed the minority approach, after stating that such rule was inapplicable in the given case because there was no valid marriage between the deceased and the alleged first wife. Furthermore, in *Evans v. Industrial Comm., supra,* the court applied the Ohio rule that favors the validity of the first marriage, in a case in which there was no indication of a competing claim by the first wife.

The attempted distinction on the ground that Ohio would follow a different rule where a third party is the

contestant is not valid. Just what is meant by third party is not clear. In *Evans v. Reynolds, supra,* the contestants were collateral heirs, next of kin, of Morgan Reynolds, deceased. It would seem that they were third parties as distinguished from parties to the marriage. In *Evans v. Industrial Comm.* cited above, the Commission refused to pay wives on the ground of prior undissolved marriages. The Commission was a third party as far as the marriages were concerned. There were two cases. In one the wife had a prior marriage and in the other the deceased husband had a prior marriage. In neither case was there any evidence of a dissolution of the marriage. The district judge stated the proposition in reverse when he said, "There was no evidence to show that Andrew Domany was not divorced from his European wife." The proposition, under Ohio law, should have been that there was no evidence that a divorce was obtained from the European wife either prior to or after the second marriage.

The Federal District Court is bound to follow the Ohio rule that places the burden of proving the dissolution of the first marriage on the party asserting the validity of the second marriage. In this case that burden is on Andrew Domany once the issue is raised as to the validity of his marriage to Mary Domany. With the burden being on Andrew Domany, Sears was not required to affirmatively defend by way of offering evidence. It appears to us that there was sufficient question about the validity of Andrew Domany's marriage to Mary to put him on proof of the dissolution of his first marriage. If that first marriage was terminated by divorce or otherwise, he should have no difficulty in establishing that fact. In the interest of justice, the appellants should not be exposed to a $65,000 judgment by a plaintiff whose right to recover is based on

a valid marriage to Mary Domany, absent proof of the termination of his prior valid marriage to a wife now living in Europe.

In a retrial of this case, if counsel desire to pursue this issue, it should be clearly presented and the trial judge should follow the Ohio rule as here outlined.

Since this case will be remanded for retrial, we proceed to discuss other questions which will necessarily be involved in another trial. Otis claims that a verdict should have been directed for it, since its only connection with either Sears or the escalator was its contract with Sears to service the escalator.

Ohio no longer requires privity of contract between a manufacturer and a consumer in order to hold the manufacturer liable for negligence in manufacture. *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465; *Witherspoon v. Haft*, 157 Ohio St. 474. In 1956, the Supreme Court of Ohio abrogated the rule of privity with reference to maintenance contracts.

> "* * * where one, for a consideration, undertakes to provide an inspection or examination service for the mechanical equipment owned or controlled by another, the former is thereby charged with the duty of performing those services in a reasonably proper and efficient manner, and, if such duty is negligently or carelessly performed whereby injury occurs to a blameless person lawfully using such equipment, such injured person has a right of action directly against the offending contractor. Liability in such instance is not dependent upon any contractual relation between the person injured and the contractor but on the failure of the contractor to exercise due care in the performance of his obligation." *Durham v. Elevator Co., supra*, p. 37. See also, *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255 (C.A. 6).

Under this rule Otis can be held liable to the plaintiffs for any acts of negligence on its part proximately causing injury to the plaintiffs. In the second cause of action, the plaintiffs charge Otis with acts of negligence which relate to maintenance and service of the escalator, particularly permitting the escalator to be in such condition as to cause it to stop suddenly. There was conflicting testimony with reference to safe stopping distances for escalators. This was under the management and control of Otis and was a proper question to be submitted to the jury.

We come now to the question of res ipsa loquitur. Both Sears and Otis claim that the court erred in submitting the case to the jury on res ipsa loquitur.

Otis and Sears both agree on the requirements of the doctrine of res ipsa loquitur but each denies that it is applicable to the facts of this case as related to it. In Ohio, res ipsa loquitur is a rule of evidence which permits, but does not require the jury to infer negligence in certain situations. It does not shift the burden of proof to the defendant, and the plaintiff is not entitled to a directed verdict in his favor if the defendant presents no rebuttal evidence. There are two prerequisites for the application of the doctrine. The instrumentality causing the injury must be under the "exclusive management and control" of the defendant, and the accident must be one that would not ordinarily occur except in the absence of due care. *Fink v. N. Y. C. Rd. Co.*, 144 Ohio St. 1.

Otis argues that under the rule of *Durham* the necessary negligence that must be proved cannot be based on the doctrine of res ipsa loquitur. In support of this claim two cases are cited. *Parise v. Otis Elevator Co.*, 100 Ohio App. 200; *McDonald v. Elevator & Machine Co.*, 60 Ohio App. 185. In these cases the doctrine was not applied for the reason that it was held that the elevators were not

within the exclusive management of the defendant maintenance companies. These cases can be distinguished from the case at bar on the basis that the owners made their own adjustments to the elevators.

Otis argues that no showing was made that this accident would not have occurred except in the absence of due care. This argument is based upon evidence which tended to demonstrate that someone pushed one of the stop buttons located at either end of the escalator. Claiming that this was the specific cause of the stoppage, or that it was, therefore, equally inferable that the accident was caused by someone other than the defendant, Otis argues that res ipsa loquitur is inapplicable. *Loomis v. Toledo Rys. & L. Co.*, 107 Ohio St. 161; *Glowacki v. Ry. & P. Co.*, 116 Ohio St. 451; *Price v. Dot's Super Market, Inc.*, 177 Ohio St. 122. However, the question involved is more than one of determining why the escalator stopped, but it is determining why the escalator stopped with such abruptness as to cause plaintiff to lose her balance. Otis' argument fails to meet this point. Furthermore, if the jury could initially draw a valid inference of negligence, the court should not be permitted to determine that the explanation offered by a defendant, as a matter of law, exonerates him from fault. The inference of negligence remains. *Fink v. N. Y. C. Rd. Co., supra; Weller, Exrx. v. Worstall,* 129 Ohio St. 596; *Glowacki v. Ry. & P. Co., supra.* The plaintiff is not required to exclude all possible causes of the accident. *Nanashe v. Lem Mon,* 82 Ohio Law Abs. 97. Viewing the evidence most favorably to the plaintiff, as the court must do in determining whether res ipsa loquitur applies, (*Howard v. Pennsylvania Rd. Co.*, 43 Ohio App. 96,) the court correctly held that the jury could reasonably infer that it was probable that the acci-

dent would not have occurred if due care had been exercised.

Sears and Otis each claim that the other had exclusive control of the escalator, so that the court erred in applying res ipsa to each, and Otis further claims that the doctrine is not applicable where two defendants are being sued.

When two or more defendants have adverse interests, such that the action of one breaks the chain of causation which links the other defendants to the accident, res ipsa loquitur has not been applied. *Huggins v. John Morrell and Co.*, 176 Ohio St. 171; *Price v. Dot's Super Market, Inc., supra; Parise v. Otis Elevator Co., supra; McDonald v. Elevator & Machine Co., supra.* But where the possession and control is joint, Ohio has recognized that the doctrine may apply, citing with approval the following quote from *Joffre v. Canada Dry Ginger Ale, Inc.*, 222 Md. 1, 158 A. 2d 631.

> "'* * * generally it has been held that *res ipsa* is not applicable against multiple defendants where it is not shown that their liability was joint or that they were in joint or exclusive control of the injury producing factor, * * *.'" *Huggins v. Morrell Co., supra.*

Consequently, by establishing joint control, the trial court was correct in applying res ipsa to both defendants.

As a passenger on the escalator, a common carrier, Sears, as owner, owed plaintiff the "highest degree of care of which the situation was reasonably susceptible." *The May Dept. Stores Co. v. McBride*, 124 Ohio St. 264; *Welch v. Rollman & Sons Co.*, 70 Ohio App. 515. To permit Sears, while owing the highest duty of care toward plaintiff, to shift its responsibility to a maintenance contractor, would allow persons to contract away a duty imposed upon them by law.

> "One who expressly or by implication invites others to come upon his premises must exercise ordinary care to guard them against danger, and to that end he must exercise ordinary care to render the premises reasonably safe for the invitees; *he cannot delegate this duty to an independent contractor.*" 28 *Ohio Jurisprudence* 2d 371, Independent Contractors, Sec. 27. (Emphasis added.)

Accord, *Richmond Bros. v. Miller,* 131 Ohio St. 424; *C. & S. Bell Tel. Co. v. Eadler,* 75 Ohio App. 258. Being unable to delegate its duty, Sears and Otis must be considered in joint control and management of the escalator. In the alternative, if Otis be found to have exclusive management and control, its negligence would be attributable to Sears.

In considering whether res ipsa loquitur is applicable, practical considerations of management and control, not possession, are determinative. *Schafer v. Wells,* 171 Ohio St. 506. It is not necessary that the defendants have continuing control and mangement, but merely that there be no intervening control and that the defendant have the right to exercise such control. The question to be determined is whether it was probable that the defendant was responsible for the negligence connected with it. *Schafer v. Wells, supra.* Inasmuch as Sears only started and stopped the escalator, whereas Otis installed it, performed all the maintenance and servicing, inspected it weekly to check its operational efficiency, and was, therefore, in a position to discover any defect, it was proper to hold that Otis had control and management of the escalator.

Therefore, being the type of accident that would not occur in the absence of due care, the court was correct in applying the doctrine of res ipsa loquitur to both Sears and Otis, either upon the theory of joint control, or upon the theory that Otis was in control and its negligence was

attributable to Sears, because Sears owed a non-delegable duty to the plaintiff.

Sears claims that it was error to submit the case to the jury on both res ipsa loquitur and specific negligence. The Ohio Supreme Court, in disapproving a dictum rendered in *Winslow v. Bus Co.*, 148 Ohio St. 101,[3] aligned itself with the majority of American jurisdictions, by stating:

> "In our opinion, if the allegations of the petition and the proof in support thereof call for its application, the doctrine of *res ipsa loquitur* should be applied even though the petition alleges also and evidence is offered to prove specific acts of negligence." *Oberlin v. Friedman*, 5 Ohio St. 2d 1.

Consequently, the trial judge did not err in submitting the case to the jury on the doctrine of res ipsa loquitur and specific negligence against both Otis and Sears.

The judgment of the District Court is reversed and the case is remanded for a new trial.

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[3] "The doctrine of *res ipsa loquitur* is not applicable in a case where the petition and proof disclose that plaintiff had knowledge of the facts and circumstances showing the claimed negligence of defendant." First syllabus.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, CASE NO. 16,638, MARY DOMANY v. OTIS ELEVATOR COMPANY.

(Entered December 9, 1966.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, CASE NO. 16,639, MARY DOMANY vs. SEARS, ROEBUCK & COMPANY.

(Entered December 9, 1966.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, CASE NO. 16,640, ANDREW DOMANY v. OTIS ELEVATOR CO.

(Entered December 9, 1966.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, CASE NO. 16,641, ANDREW DOMANY v. SEARS ROEBUCK & COMPANY.

(Entered December 9, 1966.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

JUDGMENT ON JURY VERDICT (MARY DOMANY).

(Entered November 10, 1964.)

The action came on for trial before the Court and a jury, Honorable Girard E. Kalbfleisch, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff against the defendants Sears, Roebuck & Co. and Otis Elevator Co.,

IT IS ORDERED and ADJUDGED that the plaintiff recover from the defendants Sears, Roebuck & Co. and Otis Elevator Co. the sum of One Hundred Seventy-five Thousand ($175,000.00) Dollars and costs.

Dated at Cleveland, Ohio, this 10th day of November, 1964.

C. B. WATKINS,
Clerk of Court.

JUDGMENT ON JURY VERDICT (ANDREW DOMANY).

(Entered November 10, 1964.)

This action came on for trial before the Court and a jury, Honorable Girard E. Kalbfleisch, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff against the defendants Sears, Roebuck & Co. and Otis Elevator Co.,

It is Ordered and Adjudged that the plaintiff recover from the defendants Sears, Roebuck & Co. and Otis Elevator Co. the sum of Sixty-five Thousand ($65,000.00) Dollars and costs.

Dated at Cleveland, Ohio, this 10th day of November, 1964.

C. B. WATKINS,
Clerk of Court.

SUPREME COURT OF THE UNITED STATES, RULE 19, 1.(b), U. S. C. A.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not

been, but should be settled by this court or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

UNITED STATES CONSTITUTION, ARTICLE IV, SECTION 1.

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

UNITED STATES CONSTITUTION, AMENDMENT VII.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS.

MARY DOMANY, DIRECT EXAMINATION:

(37) Q. Now, directing your attention to November 18, 1960, (38) could you tell us what happened to you on that date, please? A. We went to Sears, Roebuck store in Southgate.

Q. What time was that, please? A. It was around 7:00 or 7:30 in the evening, and it was before Christmas, and we went to buy some toys for the kids. My husband went with the children to the first floor, to the toy department, and I went to the second floor to pay some bill. I

don't remember what kind of a bill. I did pay the bill, and I started to come, I was supposed to meet my husband and children in the toy department on the first floor. I went up the escalator. When I come down I used it again, and I, in my best knowledge all in my life I always hold the rail when I use the escalator, and I did this time, too. I can't tell exactly how far I was from the first floor, seven, eight, ten, fifteen steps. Anyway I was standing there, and I hold with my hand. My hand was on the rail and the escalator did stop, and that was my last feeling. It is hard to describe how. It seemed somebody uses a brake, you know, it was just stopped, and the next second I was down in the first floor.

* * * * *

MARY DOMANY, CROSS EXAMINATION:

(68) Q. Now, Mrs. Domany, for a few moments I would like to ask you questions with respect to the accident itself. Now, you were descending the escalator from the second floor to the first floor when this episode occurred, is that right? A. Yes.

Q. And then at some point the escalator stopped? A. Yes.

Q. Now, when it stopped is it the fact that there was a man at about the second or third step from the bottom of the escalator? A. A man was before me, almost down.

Q. When the escalator stopped what happened to him? (69) A. He don't fall. He just walk away.

Q. He just went on his way? A. Yes.

Q. Did you ever find out who he was? A. No.

Q. Now, at about the time the escalator stopped, you were what—about halfway down the escalator? A. I don't know. I don't know how far I was.

Q. Might you have been much closer to the bottom than halfway? A. I could—me, I don't know whether it

was one or two or three steps. I don't remember how it was. I remember it was about the middle.

Q. Now, with respect to whether you were carrying anything, did you have a purse with you? A. Yes.

Q. In which hand were you carrying the purse? A. Most of the time I carry it in my right arm.

Q. Well, on that particular day do you know whether you were carrying your purse in your right hand or in your left hand? A. I believe it was in my right hand.

Q. Were you holding onto the handrail when this accident occurred? A. Yes.

(70) Q. With which hand were you holding onto the handrail? A. My left.

Q. You were holding on with your left hand? A. Yes.

Q. This is clear in your mind? A. Yes.

Q. Do you say that because when you fell you fell toward your left? A. I suppose.

Q. In other words you say you were holding on with your left arm because you fell toward the left of the escalator as you fell? A. I can't recall. I was closer to the left side than the right.

Q. Well, but the point I am trying to make, Mrs. Domany, is it the fact that it is because you fell toward the left side that you believe you were holding on with your left hand? A. No.

* * * * *

MARY DOMANY, RE-DIRECT EXAMINATION:

(84) Q. Mrs. Domany, you said there was a man in front of you on the escalator, is that correct? A. Yes.

Q. Did you see anyone else on the escalator? A. No.

Q. Just yourself and that one man? Will you say that is accurate? A. Yes.

Q. And that man was further toward the bottom than you were, is that correct? A. He was almost down. I don't know the steps.

(85) Q. Did you have an occasion to observe what happened to him when the escalator stopped? A. I don't know what happened with him. I don't see him any more.

Q. You just remember he was on the escalator with you? A. Yes.

* * * * *

ANDREW DOMANY, CROSS EXAMINATION:

(112) Q. Mr. Domany, you were present on Friday when Mrs. Domany said you were married in February of 1952, is that correct? A. Yes.

Q. And under oath in Mr. Schipfer's office, in 1964, you testified you were married on February 2nd, 1952, is that correct? A. Yes, February 2nd.

Q. When were you, in fact, married to Mrs. Domany? A. Just home, no ceremony. I say to my wife—she told me, "I take you to my wife, and she take me to husband."

Q. I see. A. Because I was married before and her husband was divorced, and she is Catholic, and I am Protestant, and we understand. We did it this way.

Q. If I understand you, Mr. Domany, there was no ceremony (113) before a Justice of the Peace or minister? A. Not here by this married.

Q. Yes? A. No.

Q. Well, did there come a time when you did have a ceremony before a Justice of the Peace or a minister? A. Before?

Q. Did there come a time when you were married before a Justice of the Peace or a minister to Mrs. Domany? A. Yes.

Q. When was that, sir? A. 1957.

Q. What was the date of that ceremony, sir? A. It was August 17th, Angola, Indiana, 1957.

Q. At the time you began to live with Mrs. Domany in February, 1952, were you then divorced from your wife in Europe? A. I was divorced because my wife—my ex-wife, she in Czechoslovakia—give to the court—

Q. Did you believe you were then divorced? A. Yeah.

Q. I see. Then is it the fact, Mr. Domany, that you filed for divorce here in Cleveland in 1953, a year after? A. Yes.

* * * * *

(114) Q. I see. Did you get a divorce from her in 1953, at that time, from your wife in Europe? A. No.

Q. You did not. All right. Now, did you have three children living in Europe from your first marriage? A. Yes.

* * * * *

ANTON J. EICHMULLER, DIRECT EXAMINATION:

(210) Q. All right. Now, directing your attention to the Sears' Southgate location, are you familiar with that? A. Yes, sir.

Q. Did you have occasion, at my request, to make certain examinations there? A. Yes, we made two visits to the Sears' Southgate store.

Q. What is the date of the first visit? A. As I recall, March 26, 1964.

(211) Q. All right, and will you describe to the Court and the jury what you did when you went there. A. Went out to the store specifically to review the electrical installations. We checked the operation of the escalator. When the maintenance man turned the escalator on, we rode the escalator down.

Q. Who was present at that time? A. You were, Mr. Stillman, Mr. Schipfer, and Mr. Gallagher were present,

and I do believe there was a store maintenance man who provided the keys.

Q. All right, and then when you say we rode the escalator down, who was there? A. This one particular occasion there was you, Mr. Stillman, and Mr. Schipfer, as I recall. I was standing on the left, you in the center, or to my right, and I think Mr. Schipfer may have been one step ahead or even on the same tread as we were standing on.

Q. All right. Prior to this time had you had occasion to examine the wiring diagram? A. Prior to this time, no, sir. The wiring diagrams were not available at that time.

Q. Now, would you further describe what happened as we were riding down the escalator? A. Well, as we rode down the escalator we asked Mr. Gallagher if he would be kind enough to operate the key-operated (212) switch, or momentary stop, down to the foot of the escalator. As we were riding down we had no idea when it was going to occur, and when the escalator was stopped it stopped rather abruptly. Some of us jerked ahead, and others apparently didn't.

Q. What was your reaction? A. Well, as I rode down the escalator I tried to avoid anticipating when the escalator was going to stop, so I looked straight ahead and off to my left. As the escalator stopped it stopped so abruptly I had to move my right foot to keep from stepping down to the lower tread in order to maintain my balance.

Q. Now, what tests other than that did you conduct at that time? A. Well, when we noticed how quickly the escalator stopped I was in conversation with you and suggested we check the stopping distance of the escalator; so, not having been prepared to conduct any type of measurements of this kind, we developed a rather crude method. As I recall, you purchased some band aids, and we at-

tempted to measure the horizontal stopping distance of the escalator.

* * * * *

(214) Q. Now, did you have occasion to return to that location? A. Yes, sir, we returned approximately two weeks later, on April 6, in which we took some more readings to try to find out whether the first set of readings were reasonably accurate.

Q. Now, prior to—was it April 6th? A. Yes, April 6.

Q. Prior to that April 6th of 1964, did you have occasion to examine the electrical wiring diagrams of that escalator? A. No, sir. I believe we picked up the electrical wiring diagrams that particular morning.

Q. All right, and with regard to the measurements made April 6, what did you find—well, let's strike that. What method did you use at that time to make the measurements? A. We tried to come up with something perhaps a little more accurate. We recognized that the band aid had a (215) certain width to it, so I cut up some cardboard which had a knife edge, and with the one piece of cardboard attached to the balustrade and the other cardboard fastened to the stair tread, I thought perhaps my reaction would be better; so when the two pieces of cardboard hit I would be able to get a more accurate measurement.

Q. What measurements did you take with that system? A. At that time I reported here a total of 9 measurements which varied anywhere from an inch and a half to five and a half, and the average turned out to be three inches, in this particular case.

* * * * *

ANTON J. EICHMULLER, CROSS EXAMINATION:

* * * * *

(218) Q. And the fact is that notwithstanding the fact that you forced yourself not to anticipate the stop of the escalator you did not fall, and you did not injure yourself, did you, sir? A. No, sir. I did not fall.

* * * * *

(223) Q. One last question: when we were all riding together—do you remember that? I think we did it both times, didn't we? A. Yes.

Q. And I said I would take my hand off the handrail and we would stop it? Do you remember that? A. Yes.

Q. We did that. Do you remember that? A. Yes.

Q. Do you remember what happened to me? A. Yes.

Q. What? (224) A. You apparently stood still, Mr. Stillman leaned forward, and I went farther yet.

Q. No one fell? A. No.

Q. We weren't grasping the handrail? A. Who?

Q. I wasn't? A. I don't recall.

Q. I said that I would do it with my hand off. A. I did have to remove—

The Court: Are you asking him if you did?

Mr. Schipfer: I thought he saw it.

Q. Did you see whether I was grasping the rail? A. Frankly, I don't remember. You may have been.

Q. Do you recall that I told you at the time? A. I remember your making a comment. I don't recall whether it came prior to the escalator stopping or afterwards.

Q. Well, do you recall this, Mr. Eichmuller: that prior to that particular time I said that I am certain that I will not be thrown off balance if I am not holding the handrail, do you remember? A. I remember your making one com-

ment riding down, that you said this wasn't bad; but this was after I (225) moved around, and I looked at you rather quizzically.

Q. You don't remember that specific comment I made? A. No, sir.

Q. You don't know whether I was holding or not? A. No, sir, because I was looking straight ahead. Actually I was trying to not anticipate the stopping of the escalator. I was looking to my left.

Q. You do know I didn't fall? A. That is right.

Q. In other words, there are different people that have different opinions of this abruptness or easiness of the stop, is that correct?

Mr. Stillman: Objection.

The Court: Well, this is calling for some sort of conclusion. I will sustain it.

Q. May I rephrase it. Of the three people that were riding, and at the time there were three varying results when the escalator was stopped so far as the person himself was concerned? A. That is correct.

Q. But none of the three fell? A. That is correct.

Q. Or went off the step? A. No, sir.

* * * * *

ROBERT H. SCANLAN, DIRECT EXAMINATION:

* * * * *

(235) Q. Now, you had occasion while riding the escalator to have the stop button pushed while you were a passenger on it, didn't you? A. Yes.

Q. What was your reaction to that? A. Well, I found it necessary to hold the handrail to prevent myself from being pitched forward.

* * * * *

(236) Q. Now, did you have occasion also to measure stopping distances when we were at the location? A. Yes.

Q. What were the results of your measurements? A. We found that with one person on the escalator the closest estimate that we could make of stopping distance was about two inches. I think at the very beginning a little less than two inches, about one inch and three-quarters.

* * * * *

(243) Q. In holding the handrail you had no problem overcoming that force? A. Well, I am pretty strong.

Q. What sports have you participated in in the last 10 years?

Mr. Stillman: Objection.

A. I swim a half mile two or three times a week.

Q. Do you ski? A. Yes, sir.

Q. Are you a gymnast? A. I was in college, and I still participate.

Q. So that you are athletic? A. Reasonably so, for my age.

* * * * *

DR. GERALD H. STRATE, CROSS EXAMINATION:

* * * * *

(423) Q. Do you also recall, Doctor, that Mrs. Domany, at one time during her visit with you, told you that the man who appeared ahead of her on the escalator was, she guessed, about 65 years old? A. Yes.

* * * * *

SUPREME COURT, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1184.

MARY DOMANY and ANDREW DOMANY,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and
SEARS, ROEBUCK & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT OTIS ELEVATOR COMPANY IN OPPOSITION.

SUMNER CANARY,
DANIEL C. SCHIPFER,
1144 Union Commerce Building,
Cleveland, Ohio 44115,
Attorneys for Respondent.

April 19, 1967.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT OTIS ELEVATOR COMPANY IN OPPOSITION.

This is a tort case brought at common law to recover money damages for personal injury and loss of consortium. Petitioners have asked review of the judgments of the United States Court of Appeals for the Sixth Circuit ruling on a question of sufficiency of evidence under local law.

QUESTION PRESENTED.

The single question here involved is: Whether the District Court's erroneous refusal to submit to the jury the pleaded and proven issue of Petitioner's contributory negligence entitles Respondent to a new trial.

STATEMENT OF CASE.

Mary Domany, a shopper in Sears, Roebuck & Co. store in Maple Heights, Ohio was riding an escalator when it stopped and she fell. She sued for damages naming as defendants Sears, Roebuck & Co. and Otis Elevator Company, the latter being a concern which serviced the escalator. Andrew Domany brought a derivative action against the same defendants claiming damages for loss of consortium and the suits were consolidated for trial.

While the complaint had charged Respondent with negligence, no evidence was introduced of any defect in, or failure of, any part of the entire escalator mechanism to account for the stopping. Nevertheless, the trial court submitted the case to the jury against Respondent on the doctrine of *res ipsa loquitur*. From the beginning, Respondent's answer had pleaded the defense of contributory negligence. Substantial evidence was offered on this issue. The testimony of many witnesses established facts from which reasonable minds might conclude that Mrs. Domany was not holding the handrail either effectively or at all when the escalator stopped. Nevertheless, when submitting the case to the jury, the Court erroneously refused to charge on the issue of contributory negligence and compounded the error by affirmatively directing the jury that Mary Domany was not herself guilty of any negligence. In the absence of the vital defense of contributory negligence, verdicts were returned in favor of Petitioners upon which judgments were entered.

On review, the Court of Appeals unanimously found sufficient evidence supporting the issue of contributory negligence and ruled that the defense should have been submitted to the jury. It reversed and remanded the cases for a new trial.

ARGUMENT.

I. NO BASIS FOR GRANT OF CERTIORARI IS SHOWN.

Jurisdiction is invoked on the basis of diversity of citizenship. 28 U. S. C. 1332 (a). The substantive law of Ohio is applicable. Neither Constitutional provisions, Federal laws nor state statutes are here involved. Additionally, conflicting decisions between Courts of Appeals or conflict with decisions of this Court are not even claimed. The Court of Appeals simply applied settled principles of common law to a question of sufficiency of evidence and did so correctly. The case does not commend itself for review in this Court.

II. DECISION BELOW IS RIGHT.

1. Decision Is in Accord With Long-Settled Law.

Contributory negligence is a complete defense to action grounded in negligence. *Johnson v. Bank* (1950), 152 Ohio St. 477, 478; 90 N. E. (2d) 145:

> "Ohio follows the fundamental common-law rule that in an ordinary tort action the injured plaintiff may not recover * * * if * * * guilty of negligence proximately contributing to cause his own injury."

From the outset of this action, the issue of Mary Domany's contributory negligence was squarely in the case and was just as important as the issue of Respondent's alleged negligence, the latter being the gravamen of the complaint.

Respondent's answer affirmatively alleged contributory negligence. The Court of Appeals unanimously found ample evidence was introduced from which reasonable minds might conclude that Mary Domany was contributorily negligent.

Despite sufficient evidence supporting Respondent's defense, the trial court not only erroneously denied Respondent a charge on contributory negligence, which charge had been requested in writing, but over objection affirmatively directed a finding against Respondent on the issue. It did so in disregard of the fundamental, settled law to the contrary. *Botto, et al. v. Fischesser* (1963), 174 Ohio St. 322, 189 N. E. 2d 127; *Durham v. The Warner Elevator Manufacturing Co.* (1956), 166 Ohio St. 31, 139 N. E. 2d 10; *Hilleary v. Bromley, et al.* (1946), 146 Ohio St. 212, 64 N. E. 2d 832; *Lytle v. Boyer* (1878), 33 Ohio St. 506.

In consequence of the error, the cases were remanded for a new trial, the Court of Appeals saying in its opinion, 369 F. 2d 604, 608 (Petitioners' appendix pp. 35 and 36):

> "It is a fundamental rule of our jury system that where there is a question as to the existence of certain alleged facts, the function of determining such facts rests with the jury and not the Court."
>
> "The district judge was in error in failing to submit the issue of contributory negligence of the plaintiff, Mary Domany, to the jury."

III. NO CONSTITUTIONAL QUESTION INVOLVED.

Nothing here suggests any legitimate Constitutional question. Petitioners claim their right to a jury trial under Seventh Amendment of the United States Constitution has been invaded by the reversal below. This astonishing proposition appears for the first time in the instant petition. Petitioners' argument is not advanced by applying such phrases as the Court's "reasoning is absurd" or "not a shred of evidence," particularly in light of the Court of Appeals unanimous finding to the contrary. What Peti-

tioners ask, in the last analysis, is that this Court weigh and decide the evidence; a function which in Ohio, as indeed under the Seventh Amendment, is reserved to the jury. In truth, Respondent—not petitioners—was denied the right to trial by jury on its defense. The Court of Appeals rectified the error and remanded the cases for retrial with instructions to permit the jury to determine the issue improperly withdrawn from it in the first trial. This accords justice to all parties.

Petitioners' claim of a question under Article IV, Section 1 of the Constitution is without either legal or evidentiary support. First, the point regarding Andrew Domany's marital status dealt with the requirements of proving a valid divorce, not marriage. Never in the remotest sense did anyone, least of all the Court of Appeals, fail to grant full faith and credit to any "public acts, records or judicial proceedings" of Indiana. No written record of any Indiana proceeding was even offered in evidence. Moreover, the point was not the ground of reversal nor did it result in any final judgment being awarded.

No amount of changing or regrouping of facts can extract a Constitutional question from this record.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SUMNER CANARY,
DANIEL C. SCHIPFER,
Attorneys for Respondent Otis Elevator Company.

April 19, 1967.

No. 1184

MAY 20 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

MARY DOMANY and ANDREW DOMANY,
Petitioners,

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Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Sixth Circuit

BRIEF OF RESPONDENT SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RUSSELL E. LEASURE
PARKER M. ORR
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Respondent Sears

BAKER, HOSTETLER & PATTERSON,
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

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BRIEF OF RESPONDENT SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Sears, Roebuck and Co. files this brief in opposition to the petition for writ of certiorari and prays that said petition be denied.

QUESTIONS PRESENTED

The questions appearing under the heading "Questions Presented" in the petition are misleading and ignore the facts. Respondent therefore counter-states these questions more accurately as follows:

1. Did the Court of Appeals properly order a new trial because the trial court refused to submit the issue of contributory negligence to the jury?

2. Did the Court of Appeals act properly in laying down guidelines to be observed at the retrial of this case with respect to the marriage issue?

STATEMENT OF THE CASE

Suits were filed by Mary Domany and Andrew Domany against Sears, Roebuck and Co and Otis Elevator Company. Their claims arise out of an injury to Mary Domany. Andrew claimed that he was the husband of Mary. Sears in its answer, denied the material allegations of the complaint including the marital status of the plaintiffs and asserted the defense of contributory negligence.

On November 18, 1960, Mary Domany was on a descending escalator in respondent's store (R. 37-8). She claimed that the escalator stopped quickly and caused her to fall (R. 38, 68). The only other passenger on the escalator was a man about 65 years of age who was unaffected by the stopping of the escalator and simply walked away (R. 68-69, 423). Signs posted at the approach to and on the escalator cautioned passengers to hold the handrail (R. 689-690, 691-692, 869-871). Although Mrs. Domany testified she did so (R. 38, 69), an expert called in their behalf testified in response to a question of petitioners' counsel that he rode the escalator

holding on to the handrail and was unaffected by its stopping (R. 235). Witnesses for respondent Otis Elevator Company corroborated this expert's testimony and one of its witnesses testified that the escalator was designed so that a person holding the handrail would overcome any physical force applied to the body by reason of the stopping of the escalator (R. 873).

Andrew Domany testified that Mary and he were married before a justice of the peace or a minister in 1957 in Angola, Indiana, but admitted he had previously been married in Europe and had filed an action for divorce in Cleveland in 1953 against the European wife but no divorce was granted (R. 113, 114). There was no evidence showing that the European marriage was ever dissolved by divorce or otherwise terminated.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Contributory Negligence

In an effort to convince this Court to review the decision of the Court of Appeals, petitioners argue that its decision ordering a new trial because of the trial court's error in refusing to submit the issue of contributory negligence to the jury denied petitioners the right to a jury trial granted by the Constitution and thus so far departed from the accepted and usual course of proceedings as to call for an exercise of this court's power of supervision. The reasons advanced by petitioners are frivolous, and the cases relied upon are distinguishable or support respondent's position that the petition should be denied. A cursory examination of the petition makes it patently obvious that its essential thrust is not to demonstrate grounds for granting the writ in accordance with the criteria set forth in Rule 19 of this Court but to reargue the case and to ask this Court to review the evidence and the inferences to be drawn therefrom. This Court has long held that a writ of certiorari will not be granted for such purpose, *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1937).

Petitioners erroneously contend that because Mary Domany testified she was holding the rail, there was no issue of contributory negligence to submit to the jury, relying on *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931). Their reliance is misplaced for the decision of the Court of Appeals is not contrary to this Court's holding in *Chesapeake.*

There this Court held that the question of a witness' credibility would not permit a jury to disregard his testimony when there was nothing in the record which reflected unfavorably upon such credibility or made such testimony reasonably open to doubt. As has already been demonstrated in this case there was evidence casting doubt on Mary Domany's testimony and therefore it was proper for the jury to weigh this evidence.

Petitioners' contention that the Court of Appeals in ordering that the issue of Mary Domany's contributory negligence be submitted to the jury denied them their constitutional rights afforded by the Seventh Amendment is patently frivolous. The key that unlocks the door to the Seventh Amendment is the re-examination of a fact tried by a jury. Here the Court of Appeals did not re-examine any fact tried by a jury. The opposite is true. It reversed because a fact issue had not been examined by the jury in the first instance.*

Petitioners inappropriately cite and place great reliance upon *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U. S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (1956) as "convincing precedent" for their position. But there, unlike here, the question of contributory negligence was submitted to the jury. The sole question in *Gibson* was the

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* Petitioners cite *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1956); *Galloway* v. *United States*, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1933) for the proposition that a reviewing court may set aside a jury verdict only when there is an error of law. In the case at bar the trial court committed an error of law in refusing to submit the issue of contributory negligence to the jury. These cases, therefore, are authority for the denial of the petition.

sufficiency of the court's instruction on the subject. Hence *Gibson* has no application here.

Whether or not Mary Domany was holding the handrail was clearly a fact question for the jury. This factual element has been held to be properly considered in measuring contributory negligence of plaintiffs who claim they were caused to fall while on an escalator, *Myers* v. *Kaufmann Department Stores, Inc.*, 57 F. Supp. 577 (W. D. Penn., 1944), aff'd 149 F. 2d 968 (CA 3, 1945) and submission of the issue was clearly required under Ohio law. *McMutrie* v. *Wheeling Traction Co.*, 107 Ohio St. 107, 140 N. E. 636 (1923); *Baldridge* v. *Wright Gas Co., Inc.*, 154 Ohio St. 452, 96 N. E. 2d 300 (1951); *Sypherd* v. *Haeckl's Express, Inc.*, 341 F. 2d 65, 69 (CA 6, 1965).*

The Marriage Issue

In their struggle to create a Constitutional issue and thereby obtain a review of the evidence by this Court, petitioners imaginatively claim that the Court of Appeals should have accorded full faith and credit to Andrew Domany's oral declaration of a 1957 ceremonial marriage in Indiana. In the first place, the Court of Appeals did not rest its reversal on the question of the marital status of the petitioners but rather discussed this question, the applicable presumptions when an impediment to a second

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* Nor would the submission of the issue of contributory negligence in this case require the jury to predicate one inference upon another as petitioners argue. Under Ohio law the establishment of a fact upon separate and parallel inferences is in itself not an inference but a fact upon which other inferences may be predicated. *Hurt* v. *Rogers Transportation Company*, 165 Ohio St. 329, 130 N. E. 2d 820 (1955); *McDougall* v. *Glenn Cartage Co.*, 160 Ohio St. 522, 160 N. E. 2d 266 (1959) and the Court of Appeals properly so held.

marriage is shown and the burden of proving the dissolution thereof as a guide to the parties and the court upon a retrial of the case. The choice of abandoning or pursuing the claim that petitioners are married rests with petitioners. If there was no impediment to the marriage of 1957, petitioners may pursue the claim and should have no difficulty in proving the dissolution of the first marriage at the new trial.

Under the Constitution, Congress was authorized to prescribe the manner in which public acts and records of sister states shall be proved in order to be given full faith and credit. Accordingly, Congress enacted Title 28 United States Code, Section 1739, and prescribed that full faith and credit shall be given non-judicial records upon proof of an exemplified copy thereof. Petitioners offered no documentary evidence of the marriage but only the oral testimony of Andrew Domany. Accordingly, plaintiff's proof did not even bring into play Article IV, Section 1, of the United States Constitution.

Moreover, the Court of Appeals accepted the testimony of Andrew Domany concerning the 1957 Indiana ceremony. However, the record showed that Andrew Domany was previously married and there was no evidence of a termination of that marriage. Under the circumstances, the Court of Appeals properly applied the Ohio law in this diversity case when laying down the guidelines relating to the presumption that arises when a prior marriage has been shown and the burden of proving that such marriage has been terminated. Ohio law clearly presumes the continuance of a prior marriage and places the burden of proving the termination thereof on the parties claiming a valid second marriage. *Industrial Commission of Ohio* v. *Dell,* 104 Ohio St. 389, 135 N.E. 669 (1922). The contention advanced in the petition filed in this Court that

the decision of the Court of Appeals is in conflict with the Ohio cases cited by petitioners is without merit. The cited cases are not in point. In *Machransky* v. *Machransky,* 31 Ohio App. 482, 166 N.E. 2d 423 (1927), the issue of whether a first marriage would be presumed to have continued was not involved because the evidence showed that such prior marriage had been dissolved. In *Olijan* v. *Lublin,* 38 Ohio L. Abs. 393, 50 N.E. 2d 264 (1943), aff'd 143 Ohio St. 417, 55 N.E. 2d 658 (1944), the court recognized and acknowledged the Ohio rule but held it unnecessary to apply the rule because there had been no credible evidence to establish the first marriage.

Obviously recognizing the correctness of the Court of Appeals enunciation of Ohio law, petitioners now contend that the Court of Appeals should not have applied Ohio law but that the law of Indiana governs. This argument was neither raised in the trial court nor in the Court of Appeals for the Sixth Circuit. Aside from the fact that this Court has consistently held that it will not consider an issue raised for the first time in a petition for certiorari, *McCullough* v. *Kammerer Corporation,* 323 U. S. 327, 65 S. Ct. 297, 89 L. Ed. 273 (1945), the contention is without merit since on the issue of presumptions and burden of proof the Court of Appeals properly applied Ohio law under *Erie* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).*

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* Petitioners cite *Mazzolini* v. *Mazzolini,* 168 Ohio St. 357, 155 N. E. 2d 206 (1958) for the proposition that the validity of a marriage is to be determined by the law of the situs of the marriage. However, that decision does not concern itself with the question of what presumptions apply or which party has the burden of proving the validity of a second marriage when the record shows a prior marriage. The other decisions of this Court cited by Petitioners to the same effect as *Mazzolini* are equally inapplicable.

CONCLUSION

For the foregoing reasons it is respectfully submitted that no grounds exist for granting the petition.

Respectfully submitted,

RUSSELL E. LEASURE
PARKER M. ORR
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorneys for Respondent Sears

BAKER, HOSTETLER & PATTERSON, Of Counsel

May 22, 1957